

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

PAUL HUPP,

Plaintiff,

vs.

SAN DIEGO COUNTY, et al.

Defendants.

CASE NO. 12cv0492-GPC-JLB

**ORDER DENYING WITHOUT
PREJUDICE DEFENDANTS'
MOTION TO DISMISS AND
VACATING MOTION HEARING
DATE**

[Dkt. No. 273.]

On July 18, 2014, Defendants City of San Diego, Raymond Wetzel, County of San Diego, James Romo, Peter Myers and Joseph Cargel (collectively, "Defendants") filed a joint motion to dismiss the present action pursuant to Federal Rules of Civil Procedure 41(b), 37(b), and 37(d). (Dkt. No. 273.) Defendants argue Plaintiff failed to attend a properly noticed deposition in violation of a court order and seek dismissal of the above-captioned matter in its entirety. (*Id.*) The Court has issued two orders requiring Plaintiff to respond to the motion. (Dkt. Nos. 277, 282.) Plaintiff's deadline to file a response was September 5, 2014. (Dkt. No. 282.) On September 12, 2014, Plaintiff filed an opposition to Defendants' Motion to Dismiss. (Dkt. No. 287.) On September 16, 2014, Defendants County of San Diego and Joseph Cargel filed an objection to Plaintiff's opposition brief, requesting that this

1 Court disregard Plaintiff's untimely opposition. (Dkt. No. 288.)

2 Since the filing of the present motion to dismiss, the Court has granted
 3 Defendants City of San Diego and Raymond Wetzel's motion for summary
 4 judgment on all claims against them in Plaintiff's Third Amended Complaint
 5 ("TAC"). (Dkt. No. 278.) In addition, the Court notes that Plaintiff's TAC claims
 6 against Defendants James Romo and Peter Meyers have also been dismissed on the
 7 merits. (Dkt. Nos. 221, 228.) In fact, of the twelve causes of action alleged against
 8 the various Defendants in Plaintiff's TAC, the current operative complaint, (Dkt.
 9 No. 64), only Plaintiff's twelfth cause of action against the County of San Diego
 10 and Joseph Cargel remains. (See Dkt. No. 156) (staying this Court's adjudication of
 11 Plaintiff's twelfth cause of action due to an ongoing criminal appeal proceeding
 12 under Younger abstention principles).¹

13 Because Defendants' motion was filed prior to dismissal of several of
 14 Plaintiff's claims, the motion fails to set forth authority under which this Court may
 15 dismiss either: 1) a stayed cause of action such as the twelfth cause of action as set
 16 forth in Plaintiff's Third Amended Complaint; or 2) a "cause of action" for
 17 declaratory relief, for failure to prosecute or failure to obey a court order. Although
 18 the Court has discretion to dismiss a case under Federal Rules of Civil Procedure
 19 ("FRCP") 41(b) for a plaintiff's failure to prosecute or comply with a court order, or
 20 under FRCP 37 for failure to comply with a Court order, the Court declines to do so

22 ¹ Although no Defendant has moved this Court to dismiss the second half of
 23 Plaintiff's eleventh cause of action for declaratory relief, (Dkt. No. 64 at ¶ 126),
 24 Plaintiff's claim for declaratory relief is related to his fourth cause of action for custody
 25 credits, (Dkt. No. 64 at ¶¶ 77-87). This Court granted Defendant County of San Diego's
 26 motion for judgment on the pleadings as to Plaintiff's fourth cause of action on March
 27 4, 2014. (Dkt. No. 239.) It is well established that declaratory relief is a remedy and not
 28 a cause of action. Audette v. Int'l Longshoremen's & Warehousemen's Union, 195
 F.3d 1107, 1111 n.2 (9th Cir. 1999) ("Our discussion of plaintiff's state law claims
 excludes the alleged fifth cause of action for 'declaratory judgment,' because it merely
 seeks relief rather than stating a claim."). Absent a viable underlying claim, this Court
 may not grant declaratory relief. See, e.g., Hamilton v. Bank of Blue Valley, 746 F.
 Supp. 2d 1160, 1181 (E.D. Cal. 2010) ("In the absence of a viable claim, the complaint
 fails to support declaratory relief."); Ventimiglia v. Wells Fargo Bank, N.A., No. CIV
 13-00953 WBS CMK, 2013 WL 5719526 at *2 (E.D. Cal. Oct. 21, 2013).

1 at this juncture because the remaining cause of action in the above-captioned matter
2 is currently stayed. Accordingly, Defendants' motion is DENIED.

3 **CONCLUSION AND ORDER**

4 For the foregoing reasons, the Court hereby DENIES WITHOUT
5 PREJUDICE Defendants' motion to dismiss pursuant to FRCP 41(b), 37(b), and
6 37(d). Defendants may file a renewed motion to dismiss for failure to prosecute or
7 failure to obey a court order if Defendants set forth legal authority under which the
8 Court may grant such a motion while the remaining causes of action are stayed.
9 Alternatively, Defendants may file a renewed motion once the stay is lifted.

10 Accordingly, the Court VACATES the motion hearing set for Friday,
11 September 19, 2014 at 1:30 p.m.

12 **IT IS SO ORDERED.**

13 DATED: September 18, 2014

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15 HON. GONZALO P. CURIEL
16 United States District Judge
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